IN THE

Supreme Court of the United States

October Term, 1975
Nos. 75-1052, 1053

L. T. WALLACE as Director of Food and Agriculture of the State of California and M. H. BECKER as Director of the County of Los Angeles, California, Department of Weights and Measures; and

JOSEPH W. JONES, as Director of the County of Riverside, California, Department of Weights and Measures, *Petitioners,*

vs.

THE RATH PACKING COMPANY, a corporation, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF IN OPPOSITION.

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Opinions Below.

The Opinion (as corrected) of the Court of Appeals for the Ninth Circuit, not yet reported, is set forth in the Appendix to Jones' petition (Jones Pet. App. 1-34).* The Opinion of the District Court for the Central District of California (Jones Pet. App. 57-68) is reported at 357 F.Supp. 529.

*Citations herein to Jones' petition will be abbreviated as Jones Pet.; to Wallace's and Becker's petition, as Wall. Pet.;

(This footnote is continued on next page)

Jurisdiction.

The jurisdictional requisites are adequately set forth in Wallace's petition (Wall. Pet. 3, errata sheet).

Questions Presented.

Although each of the five questions presented by petitioners (Wall. Pet. 4, Jones Pet. 4) will be responded to as a matter of completeness*, the only questions of substance are:

1. Whether the Court of Appeals was correct in holding that the Wholesome Meat Act of 1967 precludes California from imposing (on articles prepared at Rath's establishments under inspection by the United States Department of Agriculture in accordance with the requirements under the Wholesome Meat Act) *state* labeling requirements (as to the accuracy of statements on the label as to net weight of contents) which are "in addition to and different than" *federal* labeling requirements made under the Wholesome Meat Act of 1967.

2. Whether the Court of Appeals was correct in rejecting petitioners' contention that a United States Department of Agriculture regulation (9 C.F.R. § 317.2(h)(2)) is void for vagueness because it permits "reasonable" variations from exact accuracy of labeled

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and to an Appendix, as App. Citations to the clerk's transcript and reporter's transcript in the Wallace-Becker case are C.T. and R.T., respectively; in the Jones case, J.C.T. and J.R.T. Citations to the Opinion of the Court of Appeals will be abbreviated as Opin., followed by a citation to the page in Jones Pet. App.

*Rath will not respond to Jones' arguments about liquor prohibition and taxation, which are so irrelevant that they deserve only to be ignored—as was done by the Court of Appeals.

net weight—viz., a contention that "reasonable" is vague as to amount.

3. Whether the Court of Appeals was correct in holding that the specific California net weight labeling requirements in issue are "in addition to and different than" the net weight labeling requirements of the Wholesome Meat Act of 1967 and of regulations promulgated thereunder.

Constitution, Statutes and Regulations Involved.

The pertinent constitutional provisions, statutes and regulations are:

Federal

Constitution of the United States, Article VI, Clause 2 (Wall. Pet. App. 59);

Wholesome Meat Act of 1967, 81 Stat. 584, 21 U.S.C. section 601 et seq.* (specifically, sections 601(n), 678—Wall. Pet. App. 59-60, 65-67);

9 Code of Federal Regulations section 317.2(h)(2) (Wall. Pet. App. 67-68).

California

Business and Professions Code, section 12211 (Jones Pet. App. 69);

4 California Administrative Code, Chapter 8, subchapter 2, Article 5 (Wall. Pet. App. 97-113).

Statement of the Case.

Respondent The Rath Packing Company ("Rath") cannot accept petitioners' statements of the case (which grossly deviate from the record and which understand-

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*The constitutionality of this Act never has been drawn into question in these actions.

ably contain no citations thereto*) or their description of the proceedings below. As will be demonstrated, petitioners' presentation is not fair to the Court of Appeals, to the District Court, to the issues or to the record.

This brief in opposition is solely by *Rath* and pertains only to the Wholesome Meat Act of 1967 and to meats and meat food products prepared under inspection by the United States Department of Agriculture ("USDA"). The Food, Drug and Cosmetic Act and the Federal Fair Packaging and Labeling Act are not in issue in the *Rath* case.**

It should be emphasized at the outset that there never was any evidence in this case as to the laws of any state other than California.*** The injunction ordered by the Court of Appeals pertains only to two California statutes and two regulations thereunder, and the petitions are limited to only one of these statutes and to only one of these regulations (Wall. Pet. 4; Jones Pet. 5). Moreover, the injunction further is limited to enjoining enforcement of these state laws only as to articles prepared under the Wholesome Meat Act of 1967 and under USDA inspection pursuant thereto.

Contrary to petitioners' repeated harangue about "truth-in-packaging", "true weights", "fraud in the marketplace", etc., this is not a "consumer protection"

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*Petitioners have taken unfair advantage of the current practice of not transmitting the record for corroboration in reviewing petitions for certiorari.

**The Amici Curiae Brief of 33 States does not pertain to the *Rath* case.

***The Amici Curiae Brief of Michigan, *et al.* deals with state laws supposedly based on a Handbook 67 (see Argument, part III, *infra*), none of which was involved in the *Rath* case.

case at all. The USDA possesses and uses ample authority to protect the consumer (21 U.S.C. §§ 672, 673), including without limitation at the retail level [R.T. 89], and petitioners' witness from the USDA (Hutchings) made it clear in one of the state court cases that the USDA does not need and has not sought any help from California in taking misbranded meat food products off sale at the retail level (App. 1-5). This simply is a test case, with Rath as the pawn, whereby California is seeking to ascertain how far it can go to extend its bureaucracy into a federal area.

Rath is an Iowa corporation, and is a meat processor engaged in interstate commerce and therefore subject to inspection pursuant to the terms of the federal Wholesome Meat Act of 1967 (the "Act") [C.T. 317-318]. Rath has been granted inspection by the USDA [C.T. 318] and USDA inspectors are assigned to the Rath establishment to enforce the Act and its regulations [R.T. 34-35]. USDA inspectors inspect the Rath establishment continuously and have access to all parts of the plant at all times [R.T. 83, 91].

Among Rath's meat food products is bacon, which is packaged in containers that are sold by retail stores [C.T. 318]. The facts of this case are limited to bacon but are equally applicable to other Rath meat food products subject to the Act [C.T. 319].

Part of the USDA inspection includes the inspection of labeled net weight of bacon before it leaves Rath's establishment [R.T. 53]. The Act contains a labeling requirement at 21 U.S.C. § 601(n)(5) which provides that:

> "(n) The term 'misbranded' shall apply to any . . . meat or meat food product . . . (5) if in a

package . . . unless it bears a label showing . . . (B) an accurate statement of the quantity of the contents in terms of weight . . .: *Provided,* That under clause (B) of this subparagraph (5), reasonable variations may be permitted . . . by regulations prescribed by the Secretary."

Pursuant to this statute and its proviso, Title 9 Code Federal Regulations § 317.2(h)(2) provides that:

"Reasonable variations caused by loss or gain of moisture during the course of good distribution practices or by unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large."

Hence, the federal *statute* literally requires each package of bacon to bear an accurate statement of net contents (no overpack, no underpack); however, the *regulation* relaxes this literal standard by recognizing reasonable variations from exact accuracy caused (1) by unavoidable deviations in good manufacturing practice and/or (2) by loss or gain of moisture during the course of good distribution practices.

Both of the recognized causes for reasonable variation are in accordance with reality. First, even under the best of good manufacturing practices, most packages will have some minor but unavoidable deviation from exact weight. It would be economically impossible to manufacture each package of sliced bacon with an exact weight of one pound, no more, no less—the time and cost would be prohibitive. Rath bacon in issue was packed within a pass zone of 10/16 ounce, centered upon a target or average weight as a midpoint [R.T. 138]. As of April 1, 1971, Rath's target weight

for one pound bacon was + 3/16 ounce over stated net weight; because of the off sale activities of petitioners, the target weight or overpack was changed to + 5/16 ounce on October 27, 1971, to + 7/16 ounce on January 12, 1972, and to + 12/16 ounce on March 2, 1972 [R.T. 99-101, 146-147]. These net weight compliance procedures of Rath always had full USDA approval [R.T. 52]; there was not a scintilla of evidence that Rath ever failed to follow good manufacturing practice.

Second, because of its moisture content, bacon in a nonhermetically sealed package (viz., not air tight) will lose moisture after being packaged and during the course of good distribution practices [R.T. 242, 273, 289-290]. One pound of bacon will lose approximately 1/16 ounce of moisture by evaporation between the time it is packaged and weighed and the time it leaves Rath's establishment [R.T. 133, 146, 166]. At all times, the average net weight of all bacon leaving Rath's establishment was greater than labeled net weight [R.T. 106] —viz., it was the weight of the aforesaid average overpack less the 1/16 ounce moisture loss between the time of packaging and time of leaving the establishment [R.T. 147-148].

Hence, the label of each package of bacon leaving Rath's establishment showed an accurate statement of net weight subject only to a reasonable variation caused by unavoidable deviations in good manufacturing practice. The statement in Wallace's petition (Wall. Pet. 25 fn) that packages of bacon left Rath's establishment in violation of the Act is inexcusably false—the uncontroverted evidence was that the USDA sub-area supervisor for Southern California knew of no bacon leaving the Rath establishment during the time period in issue

that was not in compliance with the labeling and net weight requirements of the Act and its regulations, and USDA records showed none [R.T. 67-69, 106]. There was no evidence that Rath had violated federal weight standards in any way (Opin., Jones Pet. App. 3).

After leaving Rath's establishment, the same one pound package of bacon will continue to lose about .3 to .4 sixteenths of an ounce of moisture per day by evaporation during the course of good distribution practice [R.T. 172-173]. Also, the wrapper of the same bacon (using a wax saturated insert board) will absorb about 5/16 ounce of moisture and grease from the bacon during such distribution [R.T. 170-172]. There was no evidence that any bacon in issue had been subjected to other than good distribution practice.

Hence, the label of each package of bacon in issue showed an accurate statement of net weight subject only to a reasonable variation caused by unavoidable deviations in good manufacturing practice and/or by loss of moisture during good distribution practice.

In the latter part of 1971 and the early part of 1972 petitioners' inspectors conducted concentrated inspections of bacon [R.T. 210-211, 227a, 248], checking not for quality or adulteration but only for the accuracy of the statement of net weight on the label [R.T. 209]. The accuracy was checked by a weighing procedure for determining net weight set forth in Title 4, California Administrative Code, Chapter 8, subchapter 2, Article 5 (Wall. Pet. App. 97-113), as supposedly authorized by Business and Professions Code § 12211 (Jones Pet. App. 69), which actually is a procedure intended to result in a "statistical estimation" of the *average* net weight of a number or "lot"

of packages at the time of ihspection—generally applied by the inspectors at the retail store [C.T. 318-319; R.T. 212, 215-216, 295, 316].* Article 5 makes no distinction between products that lose moisture and those that do not; nor does it make provision for any weight variations caused either by unavoidable deviations in good manufacturing practice or by loss of moisture during good distribution practice (Opin., Jones Pet. App. 6). As conceded in Wallace's petition (Wall. Pet. 5, 12), the California standard was "accurate-weight-on-the-average at retail".

If the inspector estimated that the average net weight of the lot was "short weight" even by as little as 1/16 ounce (less than ½ of 1%), all packages in the lot (including exact weight and overweight packages**-J.C.T. 73, 75) were ordered off sale—with no consideration as to the cause of the short weight [R.T. 216, 237] and with no recognition whatsoever of any reasonable variation as required by the federal regulation (Opin., Jones Pet. App. 6). No consideration was given to whether the packages had left Rath's plant in compliance with the Act or with an average net weight equal to labeled net weight [R.T. 218], nor to the kind of distribution practice that the bacon had been subjected to after leaving Rath's plant [R.T. 216-217], nor to whether the short weight was the result of loss of moisture during the course of good

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*Although the Opinion of the Court of Appeals discusses two statutes (§§ 12211, 12607) and two regulations (Articles 5, 5.1), the petitions (and hence this brief in opposition) are confined to § 12211 and Article 5.

**The Amici Curiae Brief of 33 States, at p. 14, argues that off sale activity which includes overweight packages "is hardly prudent or sensible. It does not help consumers and is expensive for packagers".

distribution practice [R.T. 218-219, 240, 274, 293-294, 310]—and yet loss of moisture by evaporation during the course of distribution was a primary reason why petitioners (using the California weighing procedure) found short weight in Rath's bacon at retail [R.T. 185]. Any bacon ordered off sale was thereby effectively a total loss to Rath [R.T. 142, 110, 102].

Even the USDA weighing procedure for net weight determination is different from the California weighing procedure and, whether the two procedures are applied to the same bacon simultaneously or at different times, the differences between the two procedures can lead to a different conclusion as to whether the bacon is accurately labeled [R.T. 180-181, 184-185, 304, 427, 429-430]. The USDA procedure for net weight determination is to subtract from gross package weight the weight of a dry wrapper ("dry tare") [R.T. 86-87, 173-174]. In contrast, the California procedure for net weight determination is to subtract from gross package weight not only the weight of the dry wrapper but also the weight of the moisture and grease absorbed into or retained on the wrapper ("wet tare") [R.T. 174, 234]. The California procedure of subtracting the wet tare leads to a net weight determination for a pound of bacon of approximately 5/16 ounce less than the USDA procedure using the dry tare [R.T. 176, 425]. The average "short weight" for which Becker ordered Rath's bacon off sale was 4/16 ounce [R.T. 181-182], which is less than the net weight difference resulting from the difference in weighing procedures alone.

The Court of Appeals held that application of the California requirements to Rath's meat food products should be enjoined. First, the Act (21 U.S.C. § 678) expressly ordains that no state can impose a labeling requirement which is in addition to or different than the federal labeling requirements; second, the federal regulations include a valid labeling requirement that reasonable variation from accurate weight be recognized when caused by unavoidable deviations in good manufacturing practice and/or by loss of moisture in the course of good distribution practice; third, both the District Court and the Court of Appeals found, as a factual determination, that the California labeling requirements are in addition to and different from the federal labeling requirements.

ARGUMENT.

I

The Decision Below Is Clearly Correct.

a. The Wholesome Meat Act of 1967 Preempts and Precludes California From Imposing State Labeling Requirements That Are Different From Federal Labeling Requirements.

The Act, 21 U.S.C. § 678, expressly preempts the imposition of labeling requirements (*i.e.*, label statements of net weight) by providing that:

> "Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State. . . ."

The validity of this express "clear and complete" preemptive provision of 21 U.S.C. §678 heretofore has been upheld by the Sixth Circuit in *Armour and Company v. Ball*, 468 F.2d 76, 85 (6th Cir. 1972), cert. den. 411 U.S. 981 (1973). In fact, petitioner Jones concedes preemption [J.C.T. 83; J.R.T. 26, 29-31].

Since the Act literally defines "misbranded" as a term describing the failure to meet the Act's labeling requirement of showing a statement of net weight that is accurate (21 U.S.C. § 601(n)(5)) subject to reasonable variation from two specified causes (9 C.F.R. § 317.2(h)(2)), the courts below correctly held that the express federal preemption of labeling requirements included a preemption of defining what is misbranded (Opin., Jones Pet. App. 28fn). The district court put it about as succinctly as possible: "Common sense tells us that mislabeling and misbranding are synonymous terms." (357 F.Supp. 529, 535).

Although the Act, 21 U.S.C. § 678, allows the states to "exercise concurrent jurisdiction with the Secretary . . . for the purpose of preventing the distribution . . . of any such articles which are . . . *misbranded* and are outside of [the packing plant]. . . .", the article must be "misbranded" within the definition of the Act. Hence, if California elects to exercise such "concurrent jurisdiction" with the Secretary to prevent distribution of a "misbranded" article, California must use the same standard of "misbranded" as does the Secretary. In short, California's concurrent jurisdiction is limited to preventing the distribution of meat food products which are "misbranded" as that term is defined by the Act; California cannot impose a labeling requirement which is different from the labeling requirements of the Act by imposing a definition of "misbranded" which is different from the definition of the Act—yet, this is exactly what California's § 12211 and California's Article 5 do and that is why the courts below have enjoined their application (Opin., Jones Pet. App. 28-29).

In a case of express preemption such as set forth in 21 U.S.C. § 678, there is no need to find that the state system stands in opposition to the federal.

> "When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go. . . . The legislation is not saved by calling it an exercise of the police power. . . ."
>
> *Charleston v. W.C.R. Co. v. Varnville Furniture Co.*, 237 U.S. 597, 604.

Even so, opposition in this case is clear—the state is ordering articles off sale even though the articles comply with the Act.

b. Federal Labeling Requirements Include Recognition of Reasonable Variations Arising From Two Specific Causes.

The only ground ever argued by petitioners for invalidity of the federal "reasonable variation" regulation (which recognizes reasonable variations caused (1) by unavoidable deviations in good manufacturing practice and/or (2) by loss of moisture during the course of good distribution practices) was that the term "reasonable" made the regulation void for vagueness. As the Court of Appeals aptly pointed out, the test of being "reasonable" is too well established in the law to be challenged now (Opin., Jones Pet. App. 20-22). Moreover, there is something inherently wrong in a state arguing that a federal law is vague as to the amount of protection to be provided to a citizen, and hence that the law is void and that the citizen should get no protection at all!

No evidence was offered by any petitioner as to why the well recognized and long-standing standard of "reasonable" was vague or could be replaced by a more accurately defined limit. Although petitioners now try to convince this Court that the regulation imposes such an inordinate hardship in their inspection activities, it is remarkable that they did not challenge it or contend it to be void for vagueness until the district court judge suggested the issue after the close of evidence (Opin., Jones Pet. App. 18). In fact, counsel for petitioner Jones told the district court, "Well, we don't challenge the validity of (h)(2) . . . Frankly, I hadn't considered whether it is valid or not. . . ." [J.R.T. 49].

Not only is the recognition of reasonable variation sensible to the point of being essential, but moreover

the concept of federal statutes permitting the recognition of reasonable variations by regulation, and of regulations so providing, has existed for over half a century. The Federal Food and Drug Act of 1906 as amended in 1913 (34 Stat. 768, 37 Stat. 732) provided:

> "that an article of food shall be deemed to be misbranded—
>
> * * *
>
> "Third. If in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count: Provided, however, That reasonable variations shall be permitted . . . by rules and regulations made in accordance with the provision of § 3 of this Act."

Under this statute, and the authority conferred therein, federal regulations were adopted in 1914 [Reg. 29, 5/11/1914, C.T. 887] which said:

> "(i) The following tolerances and variations from the quantity of the contents marked on the package shall be allowed:
>
> "(1) Discrepancies due exclusively to errors in weighing, measuring, or counting which occur in packing conducted in compliance with good commercial practice.
>
> * * *
>
> "(3) Discrepancies in weight or measure, due exclusively to difference in atmospheric conditions in various places, and which unavoidably result from the ordinary and customary exposure of the packages to evaporation or to the absorption of water.

"Discrepancies under classes (1) and (2) of this paragraph shall be as often above as below the marked quantity. The reasonableness of discrepancies under class (3) of this paragraph will be determined on the facts in each case."

In 1932, in *United States v. Shreveport Grain & E. Co.*, 287 U.S. 77 (1932), the United States Supreme Court upheld the validity of the "reasonable" variation provisions of the Food and Drug Act, as amended in 1913, and its regulations of 1914. The court held (1) that the statute properly gave "administrative authority to the Secretaries of the Treasury, Agriculture, Commerce and Labor to make rules and regulations permitting reasonable variations from the hard and fast rule of the act", and (2) that the regulations properly provided for reasonable variations (with no more exact tolerance being specified) caused by errors in weighing which occur in good commercial packing practice or from loss of moisture during distribution. The court said, "These regulations, which cover variations . . ., have been in force for a period of more than eighteen years, with the silent acquiescence of Congress."

On July 12, 1933, only seven months after the *Shreveport* decision, a bill was introduced in Congress to revise the Food and Drug Act completely, but the requirement pertaining to labeling of contents was proposed to be reenacted in substantially the same form as in the 1913 amendment (See C. Dunn, *Federal Food, Drug, and Cosmetic Act*, 29, 39 (1938)). Through the following five years of legislative hearings and revisions, during which time the bill was extensively debated and studied, the language of the weight-labeling

requirement remained unchanged until it was enacted in 1938 (52 Stat. 1040). The reason for relatively little change from the 1913 amendment was the intention to carry over the same law. W. A. Campbell, Chief of the Food and Drug Administration, testified before the Senate Commerce Committee that the proposed revision was "the language of the law at the present time." *Hearings on S.2800*, 73d Cong., 2d Sess. (1934) in C. Dunn, *supra*, at 1166. The committee report subsequently noted that the labeling requirement in the bill "merely repeats the provisions of the present law." S.Rep.No. 361, 74th Cong., 1st Sess. (1935) in C. Dunn, *supra*, at 245.

The current Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 301 *et seq.*), as enacted in 1938 and subsequently amended, requires that labels of foods covered by that act shall bear "an accurate statement of the quantity of the contents in terms of weight . . .: *Provided*, That . . . reasonable variations shall be permitted . . . by regulations prescribed by the Secretary." (21 U.S.C. § 343(e)). The current federal Fair Packaging and Labeling Act (15 U.S.C. § 1451 *et seq.*), as enacted in 1966 and subsequently amended, is to the same effect (15 U.S.C. §§ 1453, 1460). And the federal regulations promulgated under both of these acts, at 21 C.F.R. § 1.8b(q), provide that "Reasonable variations caused by loss or gain of moisture during the course of good distribution practice or by unavoidable deviations in good manufacturing practice will be recognized."*

*The United States Department of Justice filed with the Court of Appeals a "Brief of the United States as Amicus Curiae" in the consolidated case of *Jones v. General Mills, Inc., et al.* This brief argued *inter alia* for the validity of 21 C.F.R. §§ 1.8b(q)—and the reasoning is sufficiently applicable to 9 C.F.R. § 317.2(h)(2) that said brief is reproduced in the Appendix hereto—App. 6-25.

In 1967 Congress passed the federal Wholesome Meat Act of 1967. And in the regulations at 9 C.F.R. § 317.2(h)(2), following the pattern set by over a half century of federal laws and court decisions, the Secretary adopted the same reasonable variation regulation as already had been adopted in 21 C.F.R. § 1.8b(q).

The long-standing existence of "reasonable variation" regulations and the reenactment by Congress of the net weight labeling provisions of the Federal Food, Drug, and Cosmetic Act in 1938 (and enactment of the federal Fair Packaging and Labeling Act (1966) and of the Wholesome Meat Act of 1967), in essentially the same form as reviewed in *United States v. Shreveport Grain & E. Co.*, 287 U.S. 77 (1932), are highly indicative of validity.

When Congress reenacts a statute in substantially the same form, it is presumed to have adopted any prior judicial construction of the language (*Shapiro v. United States*, 335 U.S. 1, 16 (1948); *Dragor Shipping Corp. v. Union Tank Car Co.*, 371 F.2d 722, 726 (9th Cir. 1967)), and administrative interpretations of the prior statute also are deemed to have received congressional approval and to have the effect of law (*Commissioner v. Noel Estate*, 380 U.S. 678, 682 (1965); *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U.S. 110, 114-115 (1939); *NLRB v. Brooks*, 204 F.2d 899, 905 (9th Cir. 1953), aff'd 348 U.S. 96 (1954)).

c. California Labeling Requirements Are Different From Federal Labeling Requirements.

Both the Court of Appeals and the District Court found as a fact that California's net weight labeling requirements are different from federal net weight labeling requirements (Opin., Jones Pet. App. 6, 67).*

California's labeling requirement is of accurate-weight-on-the-average; the federal statutory requirement (sans regulation) is accurate weight as to each package —no averaging. Hence, California's requirement is different from the federal requirement if only the federal statute is considered.

Both the Court of Appeals and the District Court found that California's labeling requirements contain no provision for recognition of reasonable variation caused either by unavoidable deviations in good manufacturing practice or by loss of moisture during the course of good distribution practice (Opin., Jones Pet. App. 6, 28); the federal regulation requires such recognition. Hence, California's requirement is different from the federal requirement if the federal regulation is considered along with the federal statute.

Finally, both the Court of Appeals and the District Court found that "the California inspectors employed a different weighing method" than the federal weighing method (Opin., Jones Pet. App. 4), this difference alone accounting for more supposed short weight than the average short weight alleged to exist by petitioners.

The difference between California law and the Wholesome Meat Act of 1967 is readily understandable.

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*Petitioners recently filed an affidavit with the Court of Appeals conceding that California inspectors could not "enforce the weights and measures laws of California" if they are required to recognize the "standard" of 9 C.F.R. § 317.2(h)(2).

California's laws (§ 12211 and Article 5) antedate the Act and thus never were intended to comply with it. California's laws are applied across-the-board to every commodity that is inspected (Wall. Pet. 5)—it is not surprising that California laws designed for counting pills in a bottle or pins in a box, or for weighing applesauce in a sealed can, are different from a federal net weight labeling law which is specifically intended to recognize the unique problems encountered in manufacturing and distributing meats and meat food products that are pre-packaged in non-hermetically sealed packages.

d. Summary.

The Act expressly preempts and precludes California from imposing different labeling requirements. California's labeling requirements are different—hence, the courts have enforced the Act by enjoining imposition of California's different requirements. It is as simple as that. If California wants to enact and enforce requirements that are not different, it is free to do so (Opin., Jones Pet. App. 29).

Unless bacon is to be packaged in a hermetically sealed container, the bacon will lose moisture (and weight) from the day it is sliced and packaged (the mandatory use of a more expensive hermetically sealed container to prevent the loss of non-nutritional moisture is not in the consumer's interest). Petitioners argue that the bacon must weigh labeled net weight on the day it is purchased by the consumer, however long this may be after manufacture. This means it must be overpacked when leaving the establishment—but not even petitioners know by how much because no one knows how long it will be before the bacon

is sold [C.T. 184-185]. However, whatever the overpack selected by any individual packer, the customer would pay more for it—no lawsuit is going to furnish the consumer something for nothing. As discussed more fully in the Amicus Curiae brief filed below on behalf of the United States by the Department of Justice, this alternative of indefinite and voluntarily selected overpacks has the disadvantage for the consumer that he no longer can accurately compare price with weight, from brand to brand, because the overpacks will not be uniform among brands (App. 18-21).

On the other hand, if all bacon is subjected to the same federal net weight label requirements when it leaves the establishment (which is the last time the packer can control it), then every customer will get the same amount of nutritional substance when the bacon is purchased—the only weight difference will be due to non-nutritional moisture loss. This alternative, selected by Congress, promotes certainty and uniformity.

II

There Is No Conflict of Decision.

The decision below holds that the Act preempts "marking, labeling, packaging [and] ingredient requirements" because "Congress has unmistakenly so ordained" (Opin., Jones Pet. App. 26-27).

The Sixth Circuit heretofore likewise has held that the Act preempts "marking, labeling, packaging [and] ingredient requirements":

> ". . . in view of the clear and complete preemption ordained by Congress, this Court must enforce the Supremacy Clause and declare that

the Federal Act preempts certain provisions of the Michigan Law."

Armour and Company v. Ball, 468 F.2d 76, 85 (6th Cir. 1972), *cert. den.* 411 U.S. 981 (1973).

This preemption precludes the imposition of any labeling requirements which are "in addition to, or different than those made under" the Act (21 U.S.C. § 678).

The decision below does not deal with the same matter that was involved in the Second Circuit affirmance (without any opinion) of *General Mills, Inc., et al. v. Furness,* 398 F.Supp. 151 (S.D.N.Y. 1974), aff'd 508 F.2d 836 (2d Cir. 1975) (Jones Pet. App. 95-109), and is not contrary to any principle thereof. First, *Furness* did not deal with the Wholesome Meat Act of 1967 and never considered the express preemption clause of 21 U.S.C. § 678. As Jones says, "Section 678 has no counterpart in the Federal Food, Drug and Cosmetic Act" (Jones Pet. 19).

Second, the district court in *Furness* observed that "Both the city ordinance and federal regulation permit reasonable variations caused by loss of moisture during the course of good distribution practice." (Jones Pet. App. 97, 105-106); and held that the federal action was premature because the city ordinance imposed no penalty until and unless a state court action was filed wherein the manufacturer could attempt to justify such variations even greater in amount than allowed by the inspector, and such state court action had not yet been filed (Jones Pet. App. 108). California labeling requirements, in marked contrast, recognize absolutely no such variation whatsoever.

The point that petitioners refuse to understand is that the preemption is as to state imposition of labeling requirements that are *different* from federal labeling requirements. The court in *Furness* felt that there had not been proof of a difference between New York City and federal requirements; the difference between California and federal requirements is uncontroverted.

III

There Is No Important Question of Federal Law.

The Opinion below pertains to only two California statutes and to only two California regulations thereunder—and then only to their application to meat food products previously inspected as to net weight by the USDA. No other state has been alleged or shown to have either the same or similar labeling requirements as California. It is a fact that California's Article 5 is not employed by any other state!

Petitioners misstate that California's labeling requirements, similar requirements of other states and Handbook 67 "preserve the single national standard of accuracy" (Jones Pet. 8-12, 21-23). There was not a scintilla of evidence to justify this statement or the arguments associated with it. There was no evidence whatsoever as to the laws of any state other than California—viz., no evidence to justify petitioners' wholly unfounded arguments based on supposed "present state laws which require a uniform standard of accuracy" (Wall. Pet. 15-16). To the contrary, it is the federal Act which Congress intends shall create a "uniform national labeling standard" (Opin., Jones Pet. App. 27).

Handbook 67 is wholly irrelevant, although it is the basis upon which other states have lent their support to the petitions for certiorari—Handbook 67 was never in issue nor in evidence (neither was any Model State Weights and Measures Law). Moreover, Handbook 67 is materially different from California's requirements, *i.e.*:

> Handbook 67 recognizes net weight variations caused by moisture loss occurring during the course of good distribution practices (App. 27-28; Model State Packaging and Labeling Regulation 1975, App. 37-38). In fact, the author of Handbook 67 testified before the district court in *Furness* that proper application of Handbook 67 recognizes variations from moisture loss as *additional* to the variations allowed by the "Unreasonable Minus or Plus Errors" tabulation in the Handbook (App. 31-36). In contrast, California does not recognize variations caused by moisture loss at all. California admits that its laws are not designed to "determine the *cause* of a discrepancy from label weight" (Amici Curiae Brief of 33 States, p. 15).
>
> Handbook 67 recognizes that "greater liberality" must be exercised in determining the reasonableness of variations caused by good manufacturing practice in "packages containing large individual elements", such as slices of bacon (App. 29-30). California does not; California actually complains about the fact "that the federal standard must vary depending upon the product involved" (Jones Pet. 21).
>
> Handbook 67 recognizes that "the experience and judgment of the inspector must be relied upon" in "the building up of a working knowledge as

> to . . . what may be considered to be 'good distribution practice' with respect to the packages of an individual commodity that may gain or lose weight through gain or loss of moisture" (App. 27-28). California, to the contrary, concedes that it is "impossible" for an inspector enforcing California laws to determine the cause of a net weight variation or to determine whether it is reasonable (Amici Curiae Brief of 33 States, p. 16).

Considering such differences between Handbook 67 and Article 5, it is inexcusable for petitioners to represent that "The methods employed under Article 5 and Handbook 67 preserve the single national standard of accuracy. . . ." (Jones Pet. 23).

The Opinion of the Court of Appeals turns upon its own facts and solely upon California law. The laws of other states, and the procedures used in enforcing them, would not be reached in any review of the Opinion.

IV

There Is No Jurisdictional Question.

The supposed jurisdictional question raised by petitioner Wallace (Wall. Pet. 20-24) evaporates under an accurate presentation of the facts.

On February 17, 1972 and March 1, 1972, respectively, the district attorneys for Riverside and Los Angeles counties filed separate actions in the name of The People of the State of California against Rath in their respective county superior courts. These complaints did not involve any petitioner herein, nor the issue of off sale orders, nor federal law, nor any statute or regulation now in issue. These actions sought

money and injunctive relief for alleged violation of California Business and Professions Code § 17500, Health and Safety Code § 26550 and Civil Code § 3369 (Jones Pet. App. 7, Wall. Pet. 6fn). Rath removed both actions to the district court on grounds of diversity, whereupon each was promptly remanded for lack of diversity in that The People of the State of California are not deemed citizens of any state for diversity purposes. The remand order specifically noted the absence of any federal question on the face of the pleadings.

On March 17, 1972 (prior to filing any pleading in either state court action) Rath commenced the two actions at bench by filing complaints in the federal district court against Jones and Becker, as directors of the departments of weights and measures of Riverside and Los Angeles counties, respectively. These actions sought to enjoin off sale activity. Jurisdiction was based on 28 U.S.C. § 1331(a). Contrary to petitioners' misstatements (Wall. Pet. 7-8), these actions were the *first* to challenge the legality of each petitioner's off sale orders of Rath's meat food products and were the *first* to involve California Business and Professions Code § 12211 and Title 4, California Administrative Code, Chapter 8, subchapter 2, Article 5. Petitioner Becker was served March 20, 1972.

These federal actions were not a "defense" to the state actions, as manifested by the fact that the Los Angeles County action has gone to trial (Rath prevailed) and the Riverside County action currently is

awaiting trial.* Moreover, petitioners fail to state that the pre-trial conference order in the district court specifically provided that "There is no issue in this action related to Health and Safety Code § 26550, Business and Professions Code § 17500 or Civil Code § 3369" [C.T. 324]—which were the only statutes involved in the state court complaints.

Hence, the federal district court was first to acquire jurisdiction of the controversy as to the off sale activity under section 12211 and Article 5, upon which the petitions for certiorari are based (Opin., Jones Pet. App. 16). The application of the law as to jurisdiction based on these facts is well set forth in the Opinion of the Court of Appeals and will not be repeated here (Opin., Jones Pet. App. 9-18).

V

There Is No Question of Unclean Hands.

Petitioner Wallace argues that Rath had unclean hands because packages of bacon allegedly were short weight in violation of 21 U.S.C. § 607(b) at the time of shipment from Rath's plant (Wall. Pet. 24-25). The argument is false and unconscionable. As the Court of Appeals and the District Court both found, "There is no evidence that Rath has violated federal weight standards in any way." (Opin., Jones Pet. App. 3). Every Rath package complied with federal

*California appellate courts, reviewing preliminary proceedings in each state action, have paid no heed to petitioners' arguments against priority of the federal actions (*People v. Rath Packing Co.*, 44 Cal.App. 3d 56, 60 (1974); *Christensen v. Superior Court*, 32 Cal.App. 3d 749, 754 (1973).

law and USDA requirements [R.T. 67-69, 106] and each of the three courts which has decided the issue has held that there was no false labeling.

Conclusion.

Congress has recognized the practical obstacles to requiring absolute true net weight of moisture bearing foods at retail, and has legislated accordingly. So long as all packers are held to the same standard, neither Rath nor any other packer has an advantage over competitors—and the consumer is fully protected. Whether petitioners agree with Congress really is irrelevant.

For each of the reasons set forth herein, it is respectfully submitted that the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent
The Rath Packing Company.

APPENDIX

MR. DUNLAVEY: Your Honor, could I ask that question be read?

THE COURT: Surely.

(Question read.)

THE WITNESS: No.

MR. GRAHAM: Nothing further.

MR. GOODMAN: No questions, your Honor.

CROSS EXAMINATION

BY MR. DUNLAVEY:

Q Mr. Hutchings, you undoubtedly are aware of the provisions of the Wholesome Meat Act of 1967, are you not?

A Yes, sir.

Q And since you are on the compliance staff you are probably particularly familiar with those sections of the Act that have to do with enforcement concerning misbranding; would that not be true?

A That's correct.

THE COURT: I did not hear that last.

MR. DUNLAVEY: The question was whether he was not particularly familiar with those portions of the Federal Act that have to do with the enforcement of misbranding.

THE COURT: Oh, misbranding is the word I did not get. All right. Fine.

Q BY MR. DUNLAVEY: When I said "misbranding", you understood it to include the question of whether the label is right as to the weight of contents, did you not?

A That is correct.

Q You are aware, I think, as you said, that your department and, apparently, you have the power to detain meat at the retail level if you find it to weigh less than the labeled net weight; is that not true?

A That is correct.

Q And your department -- and, apparently, you have the power to condemn that meat; is that not the case?

MR. GRAHAM: What does counsel mean by "condemn"?

MR. DINLAVEY: It is a statutory word.

Q Do you know what it means?

A Yes. It means within meat inspection, yes. Now, wait a minute. I did not answer your question yes. Your question, we do not have the power to condemn a product.

Q What do you do with it after you detain it?

A There are three alternatives that are given to the persons that own that product. First alternative is to bring about voluntary compliance, whatever the problem is, if they will take care of it themselves.

Second alternative is voluntary condemnation by the owner of that product, not by USDA, but by them, and third alternative is litigation in the courts and the courts make a decision what will be done with the product.

Q And that would be Federal Court, wouldn't it?

A Yes, sir, sure would.

Q Now, whether you are going to take that kind of action, apparently, depends upon your evaluation of information that you receive; is that a correct understanding?

A That is correct.

Q And I gather you will take that information from wherever it comes, whether it be a government agency or a consumer, any source at all; is that not true?

A That is correct.

Q And you say you rely upon that information; do I infer correctly that you evaluate it, decide whether it is right or wrong, decide how important it is and then you either conclude to go ahead and detain or to pass it?

A That is correct.

Q Am I correct that from 1971 to the present time you have never detained any Rath product?

MR. GRAHAM: Objection.

THE COURT: Overruled.

THE WITNESS: I can't honestly answer your question because I would have to go to our records to determine that. You got to remember that we detain something like about nine and a half million pounds of products in the Western area and I have other people that work for me and I really couldn't answer that honestly.

Q All right. I will take your personal knowledge. You have testified twice in this matter. Do you have any personal knowledge of any Rath product ever having been detained by your department from 1971, 1972, 1973?

A To my knowledge, no.

Q Have you been authorized by your department to appear here as a witness today?

A Yes, sir.

Q Is it your intention to testify to this Court that

your United States Department of Agriculture does not have enough personnel in order to do the job that is allotted to it by statute?

MR. GRAHAM: Objection.

THE COURT: Overruled.

THE WITNESS: It is my intention to tell the facts, sir, whether I have enough personnel or not, I don't believe, really, enters into it.

Q BY MR. DUNLAVEY: Is it your testimony your department has more authority than it has more manpower to enforce?

MR. GOODMAN: Objection. Argumentative.

THE COURT: Overruled.

MR. GRAHAM: I would object that it is irrelevant. We are talking about the effect of their reliance on state and local weights and measures officials and other enforcement agencies, not whether they have sufficient number of personnel.

THE COURT: You may answer it.

THE WITNESS: It is certainly true that we have plenty of work to do and we could use many more employees. There is no doubt about it. But we feel -- however, don't let the small numbers influence you because, again, we do use many other agencies, many other people to get our job done and it may go to Fish & Game people. It may go to State Weights & Measures. It may go to many people, so, just because we have a small number of people does not mean we can't get the job done.

Q BY MR. DUNLAVEY: Somehow or other, I gather, last year you got 8,000,000 pounds of meat products remedied somehow or other?

A That is correct.

Q And, to the best of your knowledge, there wasn't one pound of Rath meat in it?

A To my knowledge, yes.

MR. DUNLAVEY: No other questions, your Honor.

REDIRECT EXAMINATION

BY MR. GRAHAM:

Q Do you ever ask Weights & Measures officials to order meat products off sale?

A I don't think order is a proper word. We work in conjunction with other compliance staffs within other states and we do advise them at times what our opinion would be and what our action would be under similar circumstances.

Q Do you request they order products off sale?

A We do have the delegation to state agencies to remove products and we have done this, yes.

Q Do you ever ask state officials -- state or county -- State of California Weights & Measures officials to inspect meat at the retail level for weight?

A To my knowledge, we haven't done that at this point.

MR. GRAHAM: Thank you.

THE COURT: Fine. Thank you, Mr. Hutchings.

MR. GRAHAM: I would like to call to the stand Mr. Decker please.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 74-1051
No. 73-3583

GENERAL MILLS, INC., a corporation; THE PILLSBURY COMPANY, a corporation; SEABOARD ALLIED MILLING CORPORATION, a corporation,

Appellants,

v.

JOSEPH W. JONES, as Director of the County of Riverside Department of Weight and Measures,

Appellee.

Appeal From The United States District Court
For The Central District Of California

BRIEF OF THE UNITED STATES AS AMICUS CURIAE

Respectfully submitted,

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ISSUE PRESENTED

Whether 21 CFR 1.8b(q) is valid.

STATEMENT OF THE CASE

This case is as an action for declaratory relief by General Mills, Pillsbury, and Seaboard Allied Milling, three wheat flour manufacturers, against the director of the California County of Riverside Department of Weights and Measures. The action was precipitated when the county, acting under a state statutory procedure, ordered "off sale" flour packages it determined to be unlawfully underweight. The milling companies sought a declaratory

judgment that the imposition of the state weight law on their products was unlawful and an injunction restraining the county officials from enforcing the state law against their products. Although the millers attacked the county's actions on numerous grounds, the court properly perceived that the only genuine issue was an apparent conflict between state and Federal law.

The pertinent Federal statute is 21 U.S.C. 343, which states:

> A food shall be deemed to be misbranded -
>
> * * *
>
> (e) If in package form unless it bears a label containing (1) the name and place of business of the manufacturer, packer, or distributor; and (2) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count: Provided, That under clause (2) of this paragraph reasonable variations shall be permitted, and exemptions as to small packages shall be established, by regulations prescribed by the Secretary.
>
> * * *

Pursuant to the proviso in that statute, the following regulation, 21 CFR 1.8b(q), was issued to describe the "reasonable variations" mentioned in the proviso:

> The declaration of net quantity of contents shall express an accurate statement of the quantity of contents of the package. Reasonable variations caused by loss or gain of moisture during the course of good distribution practice or by unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large.

California has a more complicated statutory scheme for regulating the labeling of packages as to the weight of their contents. Section 26551 of the Health and Safety Code is essentially identical to 21 U.S.C. 343(e).

In addition to that requirement, however, section 12607 of the Business and Professions Code requires that the net weight appear on the package; no mention of variations is made. Section 12211 of the Business and Professions Code, which establishes the authority to order products off sale, declares that the "average weight" of packages must equal the stated weight, thus by implication permitting certain variations.

The apparent Federal-State conflict, then, is in the type of variations permitted. While the Federal regulation recognizes variations arising from two sources, California's average-weight provision is equivalent only to the Federal recognition of "unavoidable deviations in good manufacturing practice." The other type of variation recognized in the Federal regulation, loss or gain of moisture, has no counterpart in the California statutes. Since flour gains or loses moisture depending on its conditions of storage, and the flour ordered off sale preceding this case was apparently less than stated weight because of moisture loss, the question arises as to which standards govern.

The district court in this case, while holding that Federal standards governed, ruled that Federal standards did not allow variations from stated weight. It reached that conclusion by stating that the case was governed by the principles it announced in Rath Packing Co. v. Becker, 357 F. Supp. 529 (C.D. Cal., 1973), and consequently, that 21 CFR 1.8b(q) was invalid for its failure to define "reasonable variations" with sufficient explicitness. The court further held that in the absence of a valid regulation, the absolute requirement for accurate labeling in 21 U.S.C. 343(e)(2) was the only law applicable. It therefore found the state statutes inconsistent and enjoined their enforcement against products also subject to the Federal Food, Drug, and Cosmetic Act.

Thus, the result of this case is that a Federal regulation that is an important part of the labeling standards has been declared invalid for vagueness, while at the same time Federal statutory standards have been held to be the only operative law. Because California has read the court's opinion as requiring labeling of minimum weight, rather than the accurate weight Federal law requires, the confusion of this situation has been compounded, leaving the law of weight labeling in California in complete disarray. It is important to clarify what the Federal law is if this important regulatory program is to be continued.

ARGUMENT

I. THE REGULATION IS ENTIRELY CONSISTENT WITH THE STATUTE AND IS THEREFORE VALID.

The regulation in this case is not challenged as unconstitutional. Thus, it is invalid only if it is unreasonable or inconsistent with the statute authorizing it to be issued. See, e.g., Commissioner v. South Texas Lumber Co., 333 U.S. 496, 501 (1948); United States v. Morehead, 243 U.S. 607, 614 (1917); Review Committee v. Willey, 275 F.2d 264, 272 (C.A. 8, 1960); United States v. Obermeier, 186 F.2d 243, 247 (C.A. 2, 1950).

A. The Statute Requires Only That the Regulation Be a Statement of Enforcement Policy

The statutory provision in question, 21 U.S.C. 343(e), had its origin in a 1913 amendment to the 1906 Federal Food and Drugs Act (34 Stat. 768). Section 8 of the original Act required that any labeling statement as to weight be correct, but there was no requirement that a statement of the

weight of the contents be made. In 1913 Congress remedied this deficiency by requiring a statement of weight, and through a proviso, sought also to take account of industrial practicalities (37 Stat. 732). As the committees of Congress saw the amendment,

> Under the terms of the bill reasonable variations are permitted, whether tolerances are or are not established by the rules and regulations, nor will the tolerances established by the rules and regulations be conclusive upon the courts in determining the question of the reasonableness of the variations, but the establishment of tolerances by rules and regulations will undoubtedly be a great aid to the producers of food products in package form by letting them know in advance what the Government officials believe to be reasonable variations. The establishment of tolerances will also be a great aid to the officials both of the General Government and to the law. S. Rep. No. 1216, 62nd Cong., 3d Sess. (1913) at 3; H.R. Rep. No. 850, 62nd Cong., 2d Sess. (1912) at 3.

In United States v. Shreveport Grain & Elevator Co., 287 U.S. 77 (1932), the Supreme Court ruled, however, that the committees' intentions had not been successfully carried out by the language of the statute. In answer to the argument that the statute was void because it substantively prohibited unreasonable variations, the Court held that the reference to variations was not part of the offense described:

> The substantive requirement is that the quantity of the contents shall be plainly and conspicuously marked in terms of weight, etc. We construe the proviso simply as giving administrative authority to the Secretaries of the Treasury, Agriculture, Commerce, and Labor to make rules and regulations permitting reasonable variations from the hard and fast rule of the act and establishing tolerances and exemptions as to small packages ...

> ...
> The effect of the provision assailed is to define an offense, but with directions to those charged with the administration of the act to make supplementary rules and regulations allowing reasonable variations, tolerances, and exemptions, which, because of their variety and need of detailed statement, it was impracticable for Congress to prescribe. The effect of the proviso is evident and legitimate, namely, to prevent the embarrassment and hardship which might result from a too literal and minute enforcement of the act, without at the same time offending against its purposes.

On July 12, 1933, only seven months after the Shreveport decision, a bill was introduced in Congress to revise the Food and Drugs Act completely, but the requirement pertaining to labeling of contents was proposed to be re-enacted in substantially the same form as in the 1913 amendment. (See C. Dunn, Federal Food, Drug, and Cosmetic Act 29, 39 (1938).) Through the following five years of legislative hearings and revisions, during which time the bill was extensively debated and studied, the language of the weight-labeling requirement remained unchanged until it was enacted in 1938 (52 Stat. 1040). The reason for relatively little change from the 1913 amendment was the intention to carry over the same law. W. A. Campbell, Chief of the Food and Drugs Administration, testified before the Senate Commerce Committee that the proposed revision was "the language of the law at the present time." Hearings on S.2800, 73d Cong., 2d Sess. (1934) in C. Dunn, supra, at 1166. The committee report subsequently noted that the labeling requirement in the bill "merely repeats the provisions of the present law." S.Rep.No. 361, 74th Cong., 1st Sess. (1935) in C. Dunn, supra, at 245.

When Congress reenacts a statute in substantially the same form, it is

presumed to have adopted any prior judicial construction of the language. See, e.g., Shapiro v. United States, 335 U.S. 1, 16 (1948); Dragor Shipping Corp. v. Union Tank Car Co., 371 F. 2d 722, 726 (C.A. 9, 1967). Here the substantial similarity between the 1913 and 1938 enactments, as well as the expressions in the legislative history that it was the intention of the drafters to carry over the existing law, causes that presumption to operate. The continuing validity of Shreveport after the 1938 Act is therefore apparent. In addition, a change in punctuation that accompanied the redrafting indicates an affirmative congressional adoption of the Shreveport interpretation. In Shreveport the Court noted that there would be no doubt that its conclusion was correct if there were a comma after the word "established" in the proviso. 287 U.S. at 82. The bill introduced in Congress seven months later had a comma inserted at that point (see C. Dunn, supra, 38), and the bill became law in that form.

As interpreted by the Shreveport Court, 21 U.S.C. 343(e) and the regulation issued pursuant to it have a special status, which the lower court failed to consider in this case. The substantive requirement is that package labels accurately state the weight of the contents. There is no exception for variations, even if reasonable or unavoidable. There is no exception for overfilling; the statute requires an accurate statement of the contents, not a statement of its minimum contents. Under Shreveport, the proviso and regulations operate to mitigate this hard-and-fast rule. The mitigation takes place not by modifying the requirement for accurate labeling, but by exempting from enforcement those violations which the Secretary deems to be reasonable violations. As the Shreveport Court read the statute, the proviso is a direction to the Secretary formally to announce his in-

tention not to enforce the statute against reasonable variations from stated contents. The regulation constitutes a reassurance to the industry that unavoidable violations will be tolerated and a direction to Government enforcement officers that they should consider the reasonableness of the error in proceeding against violators.

The regulation, therefore, does not govern or affect primary conduct. The court's statement in Rath that the regulation is void "for its inadequacy to set any recognizable standard upon which any individual may measure his conduct or his compliance with the law by which he must order his personal or business life" (357 F.Supp. at 534) misses the point. Shreveport makes clear that the proviso and regulation do not affect the legislative command to the industry. Packagers are to label their products accurately -- not higher, not lower. The proviso and regulation together constitute a formalized prosecutorial discretion or a policy of exercising a power of dispensation. See 1 K. Davis, Administrative Law Treatise, §2.02 n.15 (1958); Note, "The Power of Dispensation in Administrative Law - A Critical Survey," 87 U. Pa. L. Rev. 201 (1938). The regulation is not directed at the conduct of private parties, but at the internal operations of the Food and Drug Administration.

As a statement of policy on the appropriate times for enforcement of the accurate-labeling requirement, 21 C.F.R. 1.8b(q) is not subject to being voided for vagueness. It is well-settled that prosecutorial discretion is an executive matter not subject to judicial review unless an unjustifiable standard is used to discriminate among persons. See, e.g., Oyler v. Boles, 368 U.S. 448 (1962); Newman v. United States 382 F.2d 479 (C.A. D[illegible], 1967).

Since this regulation is in essence a statement of prosecutorial policy, the same law applies. As the standard here is based on considerations of technical capabilities and not on factors personal to potential defendants, the regulation is not subject to judicial review. The Food and Drug Administration can and will continue to observe the congressional mandate by not enforcing the law against unavoidable violations, and the lower court's ruling thwarting the statutory attempt to have the policy formally on the record should not be sustained.

B. The Agency's Interpretation of the Statute As Requiring Only the Regulation Issued Supports the Validity of the Regulation

It is well established that the interpretation given a statute by the agency charged with its administration is to be followed unless it is clearly wrong. See, e.g., Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969); Stevens v. Commissioner of Internal Revenue, 452 F.2d 741, 746 (C.A. 9, 1971). The regulation issued after the 1913 amendment did not establish percentage or other quantitative tolerances, but instead, like the present regulation, enumerated the permissible sources of variation. The pertinent part of the regulation, issued May 11, 1914, was as follows:

> (i) The following tolerances and variations from the quantity of the contents marked on the package shall be allowed:
> (1) Discrepancies due exclusively to errors in weighing, measuring, or counting, which occur in packing conducted in compliance with good commercial practice.
> (2) Discrepancies due exclusively to differences in the capacity of bottles and similar containers, resulting solely from unavoidable difficulties in manufacturing such bottles or containers so as to be of uniform

> capacity; Provided, That no greater tolerance shall be allowed in case of bottles or similar containers which, because of their design, can not be made of approximate uniform capacity than is allowed in case of bottles or similar containers which can be manufactured so as to be of approximate uniform capacity.
> (3) Discrepancies in weight or measure due exclusively to differences in atmospheric conditions in various places and which unavoidably result from the ordinary and customary exposure of the packages to evaporation or to the absorption of water.
>
> Discrepancies under classes (1) and (2) of this paragraph shall be as often above as below the marked quantity. The reasonableness of discrepancies under class (3) of this paragraph will be determined on the facts in each case. (U.S. Dep't of Agriculture, Bureau of Chemistry, Service and Regulatory Announcements (May 22, 1914) at 203; subsequently modified slightly and reprinted as modified in C. Dunn, 1 Dunn's Food and Drug Laws 15-16 (1927).)

The agency's contemporaneous and now longstanding interpretation of the statute as requiring only description of the sources of the variations must be accepted in the absence of conclusive evidence of its error.

C. Congressional Reenactment of the Statute Supports the Validity of The Regulation

Moreover, it is an equally well-established rule of construction that a longstanding administrative interpretation of a statutory provision that is reenacted in substantially the same form is deemed to have received congressional approval and has the effect of law. See, e.g., Commissioner v. Estate of Noel, 380 U.S. 678, 682 (1965); NLRB v. Brooks, 204 F.2d 899, 905 (C.A. 9, 1953), aff'd 348 U.S. 96 (1954).

The 1913 enactment amended the statute to read as follows:

> Sec. 8 ... That for the purposes of this Act an article shall also be deemed to be misbranded...

> In the case of food: ...
> Third. If in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count: Provided, however, that reasonable variations shall be permitted, and tolerances and also exemptions as to small packages shall be established by rules and regulations made in accordance with the provisions of section three of this Act.

In 1938 Congress rewrote the Act, but retained substantially identical language for this provision. Under accepted rules of construction, this reenactment constituted a congressional adoption of the agency's long-held position that its regulations on this subject need only describe the permissible variations in general, qualitative terms. The reenactment refutes the contention of the lower court in this case that the Secretary has failed to carry out the statutory mandate. On the contrary, the action of Congress in 1938 was approval of the regulations and is inconsistent with the lower court's ruling now that the statutory intent can be satisfied only through the promulgation of explicit, quantitative tolerances.

II. THE REGULATION CLARIFIES THE IMPORTANT FEDERAL POLICY OF ACCURATE LABELING AND SHOULD THEREFORE BE UPHELD.

Neither the opinion in Rath nor the opinion in this case gives any indication what the court thought to be the difference in the Federal law of labeling once 21 CFR 1.8b(q) was declared void and enforcement officers were "left with the absolute standard of the statute." (Op., p. 3). The implication of this language is that Federal law has somehow been changed by voiding the regulation. The teaching of Shreveport could not be more clear, however, that all the substantive labeling law is contained in the statute

and none in the regulation. In response to the court's order, California has changed its regulation (Cal. Adm. Code, Title 4, Chapter 8, Subchapter 2.1) and now orders off-sale all packages that are less than the weight stated on the label. In short, California has read the lower court's opinion as declaring 21 U.S.C. 343(e) to require labeling of minimum weight in the absence of a regulation permitting variations. If California has correctly interpreted the court's opinion, the court has greatly altered the legislative scheme, and its decision cannot be reconciled with the statute. Thus, an important consideration favoring the validity of 21 CFR 1.8b(q) is its utility in clarifying Federal law.

A. Federal Law Requires a Label To State the Package's Accurate - Not Its Minimum Weight

The minimum-weight labeling scheme which California has adopted in response to the lower court's opinion in this case might be regarded by some as having advantages. As a regime oriented to the individual purchase, it would assure that each purchaser receives at least as much value as he thought he was getting. It is, however, not the system Congress chose for this country. Instead, 21 U.S.C. 343(e) commands that the weight stated be "accurate," not underweight and not overweight.

Other than to offer the purchaser the ability to know if his particular needs will be satisfied by the quantity he is buying, the main purpose for weight labeling is to aid in the determination of cost. Only by knowing both the price and the weight of the package can a purchaser derive accurate information on the cost of the product, and only when the same information is known about competitive products can accurate comparisons be made. A minimum weight labeling system does not allow the purchaser to make an

accurate computation of cost. In a minimum-weight system, where all packages must be above the stated weight, there will still be variations in package weights caused by the unavoidable deficiencies of the filling machinery. But instead of these variations clustering near the stated weight, they will cluster around some unknown weight above the stated weight. The price of packages will, of course, be set in consideration of their average actual weight, not their stated weight. Consequently, the purchaser, who cannot determine the amount of overfill, and therefore cannot determine the weight on which the price is based, is less able to calculate the true cost of the product. Moreover, in making comparisons between products, there is no way of a purchaser's knowing whether different manufacturers have selected the same percentage of overfill. The choice is thus between knowing the least possible value of a package or knowing the actual value of an average package. The latter choice would seem to be much more useful to consumers over time and is the result of the accurate-weight system adopted by Congress. In any event, Congress has spoken, and its choice in favor of accurate weight must be observed.

Similar reasoning to that permitting reasonable variations due to filling machinery errors underlies the policy permitting some variation from stated weight for gain or loss of moisture. Any kind of measurement is meaningful only when the conditions under which the measurement is made are understood. The length of metal bars, for example, varies with the temperature, and the weight of a given volume of gas depends on the pressure it is under. Similarly, with food a common problem is the amount of moisture it contains. A package of flour that is five percent heavier than another is not worth any more if the additional weight is just water. Consequently, the moisture

content of a package of flour must be known before its value can be understood or compared with other packages of flour.

The problem of labeling packages when unavoidable gain or loss of moisture occurs after a package of flour leaves the manufacturer cannot be easily solved. The statute requires "accurate" labeling, but the inevitable gain or loss of moisture is unpredictable, and compliance with the terms of the statute is therefore extremely difficult. Moreover, even if moisture changes for a particular lot of flour could be estimated and the packages overfilled or underfilled accordingly, thereby complying with the letter of the statute, value comparisons would be distorted unless all lots of flour to be sold in competition with it had been overfilled or underfilled to the same extent. One package, for example, might be overfilled more than another in anticipation of longer transportation or storage times or of intermediate storage under especially dry conditions. Although both packages might have the same actual weight by the time a consumer buys them, the originally-heavier package would in fact be more valuable. Loss of water might have equalized the weights, but the originally-heavier package would have started with more flour solids, and it would still have more. Looking only at the prices and the stated weights, the consumer would have no idea which package was more valuable. Ironically, in the case of flour, strict adherence to the letter of the statute produces a useless result that is wholly inconsistent with the intent of the statute.

There is no perfect solution available to accomodate the difficulties of natural phenomena to the congressional mandate for labeling of accurate weight and to the need to provide consumers with useful information. The Food and Drug Administration has, however, developed a complete regulatory

scheme for flour, which goes a long way toward that end, but which was ignored by the lower court in this case. Under present regulations, the maximum moisture content of flour is fixed by 21 CFR 15.1(a) at 15 percent at the time it is packaged, and the package is accurately labeled as to its weight at that time. If there is subsequent gain or loss of moisture, that change does not affect the value of the product. If a package has lost five percent of its weight because of moisture loss, the package is nevertheless still equivalent to the stated weight at the Government-specified moisture level. Only the valueless water has disappeared; the nutrient solids are still entirely present. 21 CFR 15.1(a) combines with 21 CFR 1.8b(q) to create a workable elaboration of the labeling statute, one that seeks to effect the intent of the legislation. In the case of packaging and labeling flour, an unthinking insistence on accurate labeling of weight at the time of retail sale does not necessarily best serve the needs of consumers. If moisture content is not considered, the stated weight may be extremely deceptive. The present regulation carries out the statute's purpose and should be upheld.

B. State Enforcement Must Be Consistent With Federal Policy On Accurate-Weight Labeling.

The lower court in this case properly recognized that Federal standards preempt state law in regard to labeling requirements. (Op., p.2). The test for Federal preemption is whether the state regulation can be enforced without "impairing the federal superintendence of the field .... A holding of federal exclusion of state law is inescapable ... where compliance with both federal and state regulations is a physical

impossibility for one engaged in interstate commerce...." Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963). As it is impossible for a package to be labeled accurately in accordance with Federal weight-labeling standards and at the same time to be labeled in accordance with a different minimum-weight state standard, Federal law governs. The pertinent Federal statute, 21 U.S.C. 343(e), deliberately sets the rarely achievable standard of accuracy and depends on enforcement discretion to carry out its fair administration. No package will ever have so accurate a label that sensitive measuring equipment cannot detect a discrepancy. Enforcement policy thus is crucial to achievement of the substantive requirements: since most packages will vary from the stated weight, the enforcement policy cannot be arbitrary, but must encourage labeling as close to accuracy as possible.

It is well-settled that the supremacy clause (U.S. Const. Art. VI) requires state programs to respect Federal policy as well as the letter of Federal statutes. See, e.g., Nash v. Florida Industrial Commission 389 U.S. 235 (1967); Farmers Educational and Cooperative Union v. WDAY, Inc., 360 U.S. 525, 535 (1959). To avoid inconsistency with Federal law and policy, state enforcement policy must therefore support the Federal requirement of accurate labeling. A state policy of prosecuting short-weight packages, no matter how little the actual weight is less than the stated weight, would be inconsistent with Federal law and policy and would be barred by the supremacy clause. Such a policy would compel manufacturers to overfill packages in order to avoid sanctions for unavoidable variations, and a tendency away from accurate labeling would thereby be encouraged. State enforcement policy must therefore recognize unavoidable variations

if it is to be consistent with the Federal statutory requirement of accurate labeling. In short, the policy embodied in 21 CFR 1.8b(q) must be recognized in state law whether or not the Federal regulation exists. Its existence clarifies that requirement and avoids a misinterpretation of the kind California has made in its recently promulgated regulation. The validity of the Federal regulation should therefore be upheld, as it is a description of the policy that state, as well as Federal, enforcement must apply to fulfill the intent of the statute.

III. THE REGULATION IS EXPLICIT AND NOT VAGUE.

A. The Instruction to Packagers is Clear.

The regulation's definition of permissible variations is sufficiently explicit to give clear guidance to manufacturers. Other than variations related to moisture, variations are tolerated only when they arise from "unavoidable deviations in good manufacturing practice." The language allows no choice of conduct to packagers; variations are permitted only when they are "unavoidable." The reference to "good manufacturing practice" indicates that packagers are permitted to use ordinary commercial equipment and need not use scientific apparatus, but other than that there are no alternatives that might make a manufacturer uncertain of his obligation. "Unavoidable" is an explicit term and creates no doubt.

The provision for variations caused by gain or loss of moisture during the course of good distribution practice is equally explicit. The requirement for "good distribution practice" is parallel to the requirement for good manufacturing practice and indicates the necessity only for ordinary commercial methods. Once such methods are followed, the only

moisture changes tolerated are those unavoidable changes owing to natural phenomena. In effect, the requirement on moisture also permits only unavoidable variations and leaves no doubt to the manufacturer of his obligations under the law.

B. The Instruction to Enforcement Officers Is Clear.

The lower court worries that "each enforcement officer is left to his own personal standard of what is reasonable" and that this possibility makes the regulation impermissibly vague. (Op. p.3.) Although the possibility that individual officers might interpret a regulation differently has not previously been thought to constitute vagueness, even under this standard the regulation is sufficiently explicit. The moisture content of a sample of flour can be determined by routine laboratory methods, and since the weight of water is known, it can be easily calculated whether the sampled product has as much solids content as would a package of flour of the stated weight containing the permissible percentage of moisture under the Federal standard, 21 CFR 15.1(a). If it does, it is a reasonable variation; if it does not, enforcement action should be taken. The administration of this part of the regulation is entirely technical, and there is no opportunity for an officer's judgment on what is reasonable.

In respect to variations arising from the packaging process, the officer must exercise some judgment, but not on the question of what variation is "reasonable." Instead, the judgment is made as to what deviations are "unavoidable." That judgment requires an understanding of the capabilities of commercial packaging machinery, and the only source of difference in judgment among enforcement officers would be a difference of opinion on what

their capabilities were. That possibility is hardly the unbridled discretion that the lower court asserts exists under the regulation.

CONCLUSION

Certain variations from stated weight must be recognized if the Federal statutory policy of accurate-weight labeling is to be carried out. The only inconsistency between California law and Federal law is California's refusal to acknowledge the Federal policy in favor of allowing certain variations caused by gain or loss of moisture where necessary to effect the intent of 21 U.S.C. 343(e). Initially, this court should make clear that 21 CFR 1.8b(q) is a valid expression of Federal policy. In addition, the case should be remanded to the district court with directions to modify its injunction so as to prohibit application of state off-sale procedures against products in compliance with Federal labeling standards as elaborated by 21 CFR 1.8b(q).

Respectfully submitted.

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CHECKING PREPACKAGED COMMODITIES

A Manual for Weights and Measures Officials

Malcolm W. Jensen

NATIONAL BUREAU OF STANDARDS

HANDBOOK 67

U.S. DEPARTMENT OF COMMERCE • Lewis L. Strauss, Secretary

NATIONAL BUREAU OF STANDARDS • A. V. Astin, Director

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procedures in conjunction with and during the store visits made for the primary purpose of scale testing, major efforts in package checking will be most effective if they are separated from other phases of the weights and measures enforcement program. For a sustained program of package checking in a large jurisdiction, it is suggested that the very best results will be obtained if this activity is carried on by trained specialists who concentrate on this type of work.

The inspector assigned principally to mechanical inspections and only as a side line to package checking will normally execute this phase of his work in the retail stores. Occasionally even he will find it advantageous to check packages at wholesale distributors and even, in special circumstances, at the establishment of the manufacturer or packer. The specialist assigned full time to this work will find that much of his activity is carried on at the locations of the distributors and the packers in his jurisdiction. He will "run down" reports of package inaccuracies reported by other inspectors and, on his own initiative, spot-check distributors of packaged merchandise.

The primary object of the inspector in this field is to see that quantity is accurately represented to the ultimate purchaser—the consumer; nevertheless, he may be of very real service to the manufacturer, distributor, and retailer if he is able to identify the exact point at which any shortages begin to appear.

Certain packaged products distributed through the normal packer-to-distributor-to-retailer channel are subject to gain or loss of weight through the increase or decrease in moisture content, beginning immediately after the packaging occurs.

The Model Regulation provides that "variations from the stated weight or measure shall be permitted when caused by ordinary and customary exposure * * * to conditions which normally occur in goood distribution practice and which unavoidably result in change of weight or measure." The distribution point after which such shrinkage losses are permitted is a statutory or regulatory provision that varies among the States.

It is admitted that such indefinites as "ordinary and customary exposure" and "good distribution practice" are difficult to set forth quantitatively; thus the experience and judgment of the inspector must be relied upon. He will learn to compare various environments and various systems of distribution and storage. As the result of his experience he will be able to develop procedures for conducting a sound investigation that will result in the building up of a working knowledge as to what is "customary exposure" and what may be con-

sidered to be "good distribution practice" with respect to the packages of an individual commodity that may gain or lose weight through gain or loss of moisture.

To be truly adequate, a package-checking program must be extensive with respect to the relative time spent, and diversified with respect to the types of packages checked. General coverage of the packages offered for sale in the jurisdiction is the key to adequacy and appropriateness. A program should not be directed to a single type of package, such as fresh meats in self-service markets, or even to a few types. Packages distributed through interstate commerce, canned peas and bottled vinegar, for example, should receive a proportionate share of attention.

Although a weights and measures administrator will direct concentration on specific items for special surveys or to correct quickly faults that have been discovered, he will plan the general program so as to "sample" all areas of commodities sold in packages.

3. CLASSES OF PREPACKAGED COMMODITIES

There are two distinct classes of prepackaged commodities—"random" packages, representing packages of a single commodity in a variety of random sizes which in most cases are put up in the retail store, and "standard-pack" packages, representing packages of a single commodity put up in selected sizes. Within the standard-pack class there are two categories, those packages sold by weight and those sold by liquid measure. Although in certain respects the operations in regard to "random" and "standard-pack" packages differ, the equipment used for the checking and the approach to the checking activity are similar in each case.

4. EQUIPMENT

In the belief that the testing equipment used by a weights and measures official should be, insofar as practicable, "standard" equipment designed especially for and restricted to official use and tested regularly and completely controlled by the official, the procedures described here will, for the most part, involve the use of special equal-arm package-reweighing scales and standard test weights. It is recommended that the first such scale required for this work be one of nominal 3-pound (actual, with careful use, 10-

of the packaging material, and then place on the load-receiving element of the scale standard weights in an amount equal to the tare weight plus the labeled weight. Note the exact indication of the scale (either automatically indicated or indicated by poise placement—with or without counterpoise weights—as the case may be). Remove these standard weights from the load-receiving element and place thereon a package to be weighed. Restore precisely the previously noted scale indication by adding or removing standard weights. The weights thus added or removed indicate the package error—*short* (minus) if weights are *added*, *over* (plus) if weights are *removed*.

Because some shortages in package weight are caused by the leaking of fluids from the commodity, and because certain packages are sufficiently watertight that they will hold such leaked fluid, it will be advisable to make special observation in certain instances. If a package containing a commodity suspected of leaking is transparent, and if any tray, cup, or other absorbent packaging material apparently has not absorbed any moisture, the package may be turned upside down so that any fluid will run to the transparent top and be easily seen. If fluid is apparent inside the package, or if the packaging material appears to be or to have been wet and soggy, the package should be opened and the net weight determined directly.

Step 2. Recording (see also Section 11).—Record the labeled weight and the error in $\frac{1}{16}$ ounce for each small package, or in an appropriate denomination for each large package. The zero errors (recorded as 0) and the plus errors are listed in one column, the minus errors in a second column. (See example, Step 5.)

Step 3. Unreasonable errors.—Circle errors that are "unreasonably" large, either plus or minus. The decision as to the unreasonableness of an error, though of necessity arbitrary, must be made and may be predicated, to a certain extent, on knowledge. Consideration should be given to (1) the allowable error in the commercial device employed in the packaging process, (2) the possible error in the scale used to check the packages, (3) anticipated reasonable human errors in both operations, and (4) the susceptibility of the packaged commodity to accurate weight control at the time of packaging. The table that follows is suggested for both random and standard-pack packages that contain items of such a nature that they are susceptible of precise weight control. Standard-pack packages of such commodities as apples, potatoes, and the like cannot be controlled as pre-

cisely as can packages of commodities such as peas, corn, sugar, salt, and flour; consequently the inspector must exercise greater liberality in the determination of the reasonableness or unreasonableness of errors in packages containing large individual elements.

(It will be noted that the suggested plus allowances are twice the suggested minus allowances at each "labeled quantity." This is an acknowledgment that packers must be allowed to overfill such packages as are susceptible of moisture loss.)

UNREASONABLE MINUS OR PLUS ERRORS

Labeled quantity	*Minus error Greater than*	*Plus error Greater than*
0 to 2 ounces	1/6 ounce	1/4 ounce.
2+ to 8 ounces	1/8 ounce	3/8 ounce.
8 ounces+ to 2 pounds	1/4 ounce	1/2 ounce.
2+ to 4 pounds	1/8 ounce	3/8 ounce.
4+ to 7 pounds	3/8 ounce	3/4 ounce.
7+ to 14 pounds	1/2 ounce	1 ounce.
14+ to 24 pounds	3/4 ounce	1 1/2 ounces.
24+ to 36 pounds	1 ounce	2 ounces.
36+ to 51 pounds	8 ounces	1 pound.
51+ to 101 pounds	2 pounds	4 pounds.

The figures offered above are suggested for the determination of the "reasonableness" of errors in individual packages; they should not be used as tolerance figures.

Step 4. Action based on unreasonable errors.—Action should be taken with respect to the packages with unreasonable errors (either + or −); the following is suggested:

(a) If one package of the sample of 10 packages has an unreasonably large *minus* error, that package may be ordered repacked or relabeled, or may be held to constitute a violation of the statute and taken as evidence, at the discretion of the inspector.

(b) If there are in the sample of 10 packages 2 or more packages with unreasonably large *minus* errors, the *entire lot* should be held in violation, *without further calculation.* Appropriate action with respect to ordering off sale, prosecution, or the like should be taken. (See 10. Official Action.)

(c) If 3 or less of the sample of 10 packages have unreasonably large *plus* errors, these should be called to the attention of the market operator or the person responsible.

(d) If there are in the sample of 10 packages 4 or more packages with unreasonably large *plus* errors, this should be considered to show poor packaging practice, without further calculation. This situation should be called to the attention of the store operator, who should be instructed as to more precise weighing.

Affidavit of Malcolm W. Jensen
(Filed December 19, 1973)

STATE OF NEW JERSEY)
ss:
COUNTY OF ESSEX)

MALCOLM W. JENSEN, being duly sworn, deposes and says:

1. At the present time I am and since April 1973 have been president of the Can Manufacturers Institute, a trade association with offices at 1625 Massachusetts Avenue, N.W., Washington, D.C. Prior to April of this year I was for many years employed by the United States Government. From July 1951 to July 1960 I was Assistant Chief of the Office of Weights and Measures, National Bureau of Standards in the United States Department of Commerce. In July 1960 I became Chief of that office and served in that capacity until April 1966, when I became Manager of Engineering Standards which included the Office of Weights and Measures. From April 1969 to December 1970 I was first, Deputy Director and later Director of the Institute of Applied Technology, National Bureau of Standards in the United States Department of Commerce, which had jurisdiction over some ten technical divisions, including the Office of Weights and Measures. From December 1970 to March 1971, I was Deputy Director of the Bureau of Domestic Commerce and from March 1971 to April 1973, when I retired from the government service, I was Director of the Bureau of Product Safety—Food and Drug Administration—in the United States Department of Health, Education and Welfare. Prior to my employment by the United States Government I was the Sealer of Weights and Measures of the City of Madison, Wisconsin, and also taught mathematics at the

University of Wisconsin. As the result of my said employment and experience I have extensive and detailed personal knowledge of the matters hereinafter stated.

2. During the period when I served as Assistant Chief of the Office of Weights and Measures in the National Bureau of Standards I prepared and wrote the Handbook entitled "CHECKING PREPACKAGED COMMODITIES, a Manual for Weights and Measures Officials," which was issued on March 20, 1959 by the National Bureau of Standards as "Handbook 67." The information and procedures set forth in the said Handbook are based upon my own extensive experience in dealing with the control of prepackaged commodities and upon information which I assembled in my capacity as Assistant Chief of the Office of Weights and Measures.

3. I have been requested by counsel for plaintiffs in this action to state the source of the table of figures which appears in Section 8.1, at page 8 of Handbook 67, under the heading, "UNREASONABLE MINUS OR PLUS ERRORS," and whether those figures have any relationship to variations, after packaging, in the weight of a hygroscopic commodity such as flour caused by changes in the relative huimidity to which the package is exposed.

4. The said table of "Errors" was based solely upon information which was collected by me or under my supervision with respect to errors in the weight of packaged commodities which resulted from "deviations" at the time of packaging either because of the nature of the commodity or the limitations of the packaging machinery or of humans involved in the packaging or check-weighing operation. The said figures have nothing whatsoever to do with "variations" in the weight of hygroscopic commodities which occur, after the packing process is completed, as the result of a gain or loss of moisture caused

by changes in the relative humidity to which the commodity is exposed.

5. A thoughtful reading of the paragraph in which the table appears, together with a reading of Section 2 of Handbook 67, will clearly demonstrate the accuracy of the foregoing statement. I refer particularly to the language of the last three paragraphs at page 2 of Handbook 67 which expressly advises the inspector how to deal with problems resulting from "gain or loss of weight through the increase or decrease of moisture content beginning immediately after the packaging occurs." The following language at that point is particularly significant:

> "Certain packaged products distributed through the normal packer-to-distributor-to-retailer channel are subject to gain or loss of weight through the increase or decrease of moisture content, beginning immediately after the packaging occurs.
>
> The Model Regulation provides that 'variations from the stated weight or measure shall be permitted when caused by ordinary and customary exposure ° ° ° to conditions which normally occur in good distribution practice and which unavoidably result in change of weight or measure.' The distribution point after which such shrinkage losses are permitted is a statutory or regulatory provision that varies among the States.
>
> It is admitted that such indefinites as 'ordinary and customary exposure' and 'good distribtuion practice' are difficult to set forth quantitatively; thus the experience and judgment of the inspector must be relied upon. He will learn to compare various environments and various systems of distribution and storage. As the result of his experience he will be

able to develop procedures for conducting a sound investigation that will result in the building up of a working knowledge as to what is 'customary exposure' and what may be considered to be 'good distribution practiçe' with respect to the packages of an individual commodity that may gain or lose weight through gain or loss of moisture."

6. By contrast, Step 3 under Section 8 of Handbook 67 deals with the problem of handling deviations which occur in the packing process and admonishes the weight inspector as follows:

"Consideration should be given to (1) the allowable error in the commercial device employed in the packaging process, (2) the possible error in the scale used to check the packages, (3) anticipated reasonable human errors in both operations, and (4) the susceptibility of the packaged commodity to accurate weight control at the time of packaging. The table that follows is suggested for both random and standard-pack packages that contain items of such a nature that they are susceptible of precise weight control. Standard-pack packages of such commodities as apples, potatoes, and the like cannot be controlled as precisely as can packages of commodities such as peas, corn, sugar, salt, and flour; consequently the inspector must exercise greater liberality in the determination of the reasonableness or unreasonableness of errors in packages containing large individual elements."

It is significant that the commodities referred to at that point in Handbook 67 are listed in a sequence of diminishing size, thus potatoes are smaller than apples, peas are smaller than potatoes, corn is smaller than peas, grains of sugar are smaller than kernels of corn, salt is finer than sugar, and flour is finer than salt. The point is that it is

more difficult to package precisely predetermined weights of large units of food than it is to package precise weights of smaller units of food and that the inspector should be aware of that fact when he gives consideration to "(4) the susceptibility of the package commodity to accurate weight control at the time of packaging."

7. On the basis of my personal knowledge and experience, it would be inappropriate to use the table of "Errors" which appears at page 8 of Handbook 67 as a guide to the "reasonableness" of variations in the weight of a hygroscopic commodity caused by changes in its moisture content as the result of exposure to changing relative humidity. I know, for instance, that a five-pound package of flour could lose as much as 8% of its original packaged weight when exposed to the relative humidities of less than 20% which normally and frequently occur during the winter in the northeastern part of the United States in a normally heated retail grocery store. As applied to a five-pound bag of flour, the resulting 8% loss in that situation would amount to more than six ounces; whereas the table of "Errors" in Handbook 67 would suggest that a loss greater than three-eighths of an ounce would be unreasonable.

8. I have read the "Affidavit in Opposition" filed in this cause and sworn by Miss Betty Furness on November 5, 1973 in her capacity as Commissioner of the New York City Department of Consumer Affairs. In that affidavit she states in substance that weights and measures inspectors in her department and elsewhere use the "objective federal guide lines contained in Handbook 67" to determine whether or not moisture loss in packages of hygroscopic foods is the result of "ordinary," "customary" and "unavoidable" exposure occurring in "good distribution practice." As the author of Handbook 67, I am con-

strained to say that such use of the so-called 'objective federal guide lines (meaning the table of "Errors" appearing at page 8 of Handbook 67) is a misuse of the Handbook and indicates a misunderstanding of the purpose and application ofthe so-called "guide lines."

/s/ Malcolm W. Jensen
MALCOLM W. JENSEN

NOTARIZED

U. S. DEPARTMENT OF COMMERCE
NATIONAL BUREAU OF STANDARDS

MODEL STATE PACKAGING AND LABELING REGULATION

1975

as adopted by

The National Conference on Weights and Measures

The National Conference on Weights and Measures
is sponsored by the National Bureau of Standards in
partial implementation of its statutory responsibility
for "cooperation with the States in securing uniformity
in weights and measures laws and methods of inspection."

SECTION 12. VARIATIONS TO BE ALLOWED.

12.1. Packaging Variations.

12.1.1. Variations from Declared Net Quantity. --Variations from the declared net weight, measure, or count shall be permitted when caused by unavoidable deviations in weighing, measuring, or counting the contents of individual packages that occur in good packaging practice, but such variations shall not be permitted to such extent that the average of the quantities in the packages of a particular commodity, or a lot of the commodity that is kept, offered, or exposed for sale, or sold, is below the quantity stated, and no unreasonable shortage in any package shall be permitted, even though overages in other packages in the same shipment, delivery, or lot compensate for such shortage. Variations above the declared quantity shall not be unreasonably large.

12.1.2. Variations Resulting from Exposure. --Variations from the declared weight or measure shall be permitted when caused by ordinary and customary exposure to conditions that normally occur in good distribution practice and that unavoidably result in change of weight or measure, but only after the commodity is introduced into intrastate commerce: Provided, That the phrase "introduced into intrastate commerce" as used in this paragraph shall be construed to define the time and the place at which the first sale and delivery of a package is made within the state, the delivery being either

(a) directly to the purchaser or to his agent, or

(b) to a common carrier for shipment to the purchaser, and this paragraph shall be construed as requiring that, so long as a shipment, delivery, or lot of packages of a particular commodity remains in the possession or under the control of the packager or the person who introduces the package into intrastate commerce, exposure variations shall not be permitted.

12.2. Magnitude of Permitted Variations. --The magnitude of variations permitted under Sections 12, 12.1., 12.1.1., and 12.1.2. of this regulation shall, in the case of any shipment, delivery, or lot, be determined by the facts in the individual case.